IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE: DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION

MDL No. 2817 Case No. 18-cv-00864

This Document Relates To:

Hon. Robert M. Dow, Jr.

ALL CASES

Magistrate Judge Jeffrey T. Gilbert

FILED UNDER SEAL

MDL PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE THE EXPERT TESTIMONY OF EDWARD M. STROZ

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INTRODUCTION

Defendants admit Edward Stroz is unqualified in statistical sampling and extrapolation, which he purports to use to quantify alleged DMCA violations. They have no persuasive response to the fundamental defects in his sampling and extrapolation methods, which are plainly unreliable. As to Mr. Stroz's opinions regarding security – the only topic on which he is qualified – several of his opinions should be excluded because they do not fit the facts or are legal conclusions.

ARGUMENT

I. Mr. Stroz is Unqualified To Offer Opinions that Require Statistical Expertise

Mr. Stroz has no statistical expertise. *See* Dkt. 861, Mem. 4-5. Nonetheless, he purports to use extrapolation

.¹ *See id.* at 4, 14, 20. As courts routinely hold, those without any qualifications in statistics cannot offer expert opinions based on statistical

Defendants do not deny Mr. Stroz is unqualified in statistics. *See* Dkt. 995, Opp. 10 ("Stroz never claimed to be a statistician or to offer opinions to a degree of statistical precision.").³ Instead, they offer the head-scratching rejoinder that "the law does not demand expertise in statistics to render any opinion that draws on any kind of extrapolation." *Id.* But sampling and extrapolation

techniques.²

¹ See Dkt. 861-2, Rubinfeld Rep. ¶ 78 & Table 5.

² See, e.g., In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig., 816 F. Supp. 2d 442, 451 (W.D. Ky. 2011) (precluding "expert in off-road vehicle handling and operation" from offering accident rate testimony because "[he] is not a statistician" and the testimony "is outside his area of expertise and unsupported"); Nutri Pharm. Research Inc. v. Stauber Performance Ingredients, Inc., 2019 WL 6718084, at *5-6 (D. Nev. Dec. 10, 2019) (chemist who "is not a statistician, has no background in statistics, and did not consult a statistician in coming to her conclusion" "will not be allowed to testify regarding statistical conclusions"); Spin Master, Ltd. v. Zobmondo Entm't, LLC, 2012 WL 8134012, at *22 (C.D. Cal. Apr. 27, 2012) ("But Gottlieb is not a statistician, so he cannot reliably extrapolate his broad conclusion from the 'small sample' he used.").

³ Defendants' reliance on *Stutzman v. CRST, Inc.*, 997 F.2d 291 (7th Cir. 1993), is misplaced. There, unlike here, the experts' qualifications were not challenged. *See id.* at 296.

are statistical techniques that require training in statistics. Defendants offer no authority supporting any "kind of extrapolation" a layperson without any statistics training is qualified to perform.

The undue prejudice of allowing Mr. Stroz to offer statistical opinions is manifest. A jury will be more likely to credit his flawed extrapolations – despite his lack of statistics expertise – because of his unrelated expertise in computer security. That is why the Seventh Circuit has emphasized that experts' qualifications must extend to all of the opinions they intend to offer. *See Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010) ("[W]e must look at each of the conclusions he draws individually to see if he has the adequate education, skill, and training to reach them.").

Prof. Rubinfeld's reply opinions cannot save Mr. Stroz. Prof. Rubinfeld *relied on* Mr. Stroz's sampling method for his own further computations; he did not purport to conduct Mr. Stroz's sampling and extrapolation anew. Nor could he have: by the time Prof. Rubinfeld addressed the issue in his reply expert report, it was far too late for him to tag-in for Mr. Stroz. Prof. Rubinfeld's qualifications thus cannot save Mr. Stroz's opinions from exclusion.

II. Mr. Stroz's Statistical Analyses Are Riddled With Error

A. Mr. Stroz's Yes/No Prompt Calculations Are Not Reliable



⁻ the definition of a convenience sample. 4 Id. at 6. Because Mr. Stroz did not randomly select his

⁴ CDK's claim (at 11-12) that this is not a "convenience sample" is incorrect. *See Hostetler v. Johnson Controls, Inc.*, 2016 WL 3662263, at *12 (N.D. Ind. July 11, 2016) (plaintiffs' sample was a "sample of convenience" where it only included potential class members whose phone numbers were available in the public records).

, or else his extrapolation could be biased. *See* Ex. A, Federal Judicial Center, *Reference Manual on Scientific Evidence* 382 (3d ed. 2011) ("[W]hen respondents are not selected randomly from the relevant population, the expert should be prepared to justify the method used to select respondents. Special precautions are required to reduce the likelihood of biased samples.").

was representative of the correct in the correct in

CDK's cases are not to the contrary. In *DeLeon-Reyes v. Guevara*, 2019 WL 4278043 (N.D. Ill. Sept. 10, 2019), there was no dispute about representativeness – just how many years of police records the city should produce. The court stated merely that "sample size will likely affect only the weight, not admissibility, of Plaintiffs' expert's opinions." *Id.* at *11 (emphasis added). And in *Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239 (S.D. Ill. 2015), there was no statistical extrapolation – just a consumer survey assessing whether product labeling was likely to mislead

consumers. *See id.* at 244-46. Neither court suggested extrapolation based on an unrepresentative sample would be admissible – a notion at odds with Circuit precedent and statistical principles.

CDK confirms exclusion is required by asserting (at 12) "it was reasonable to assume that the sample was representative." Statisticians do not *assume* representativeness; they take steps Mr. Stroz did not to *ensure* representativeness. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (courtroom expert must use same level of rigor as field expert). That "assumption" is also wrong. As Plaintiffs have explained (Mem. 7), the sample was meaningfully different from the broader population.

See Dkt. 861-4, O'Brien Rep. ¶¶ 24-25 & Table 1. Other evidence indicates

.5 By using a biased sample of high-usage accounts, Mr. Stroz arbitrarily inflated his estimate for the population.

CDK provides no serious response to this problem; it just asserts (at 13) – without support or analysis – that any variation in usage between accounts

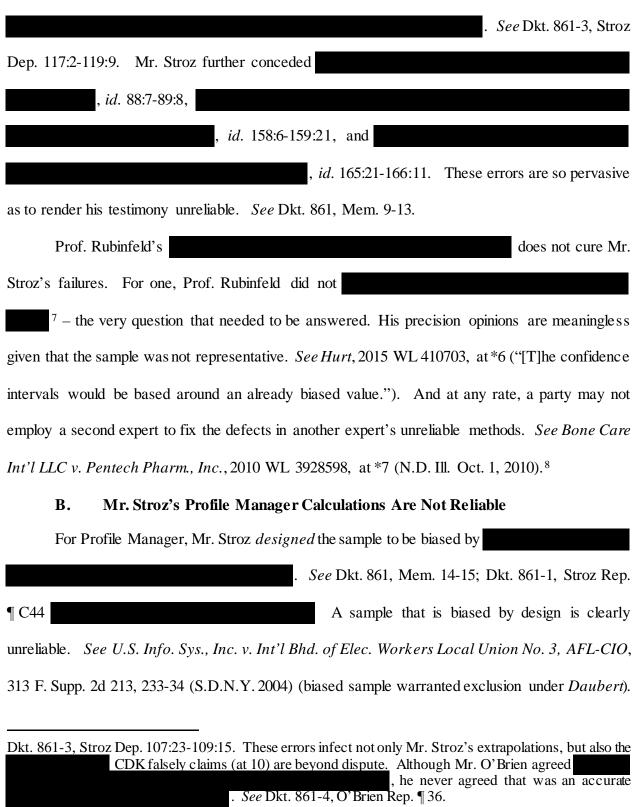
. Counsel's ipse dixit fares no better than Mr. Stroz's.

Numerous other methodological flaws infect Mr. Stroz's analysis. See Dkt. 861, Mem. 11
13. He did not bother to verify

. He conceded many accounts failed the criteria he used in his CAPTCHA analysis, 6 and

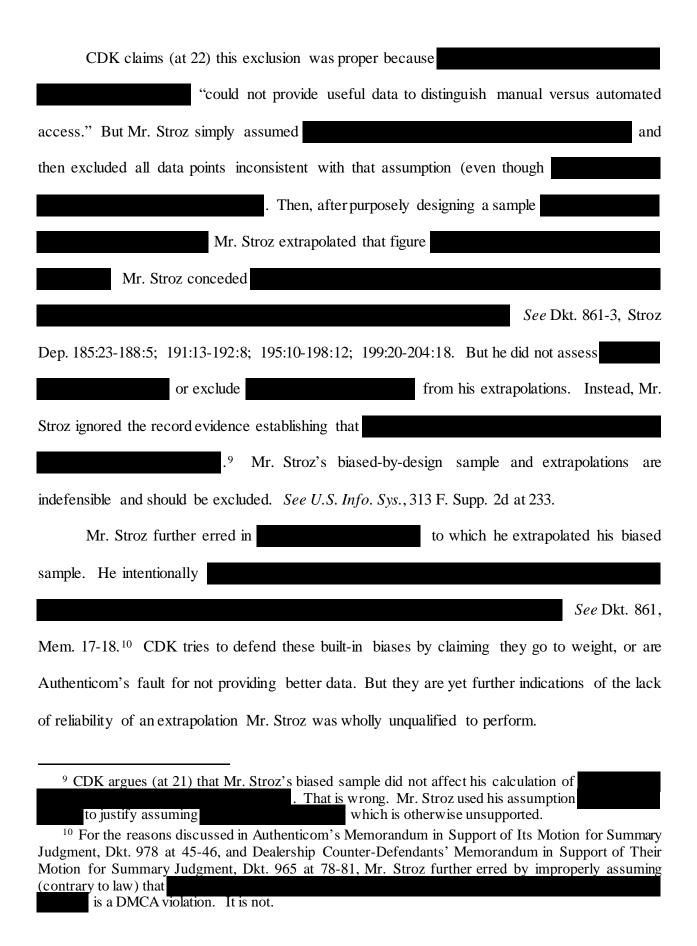
⁵ See Ex. B, CDK-0001429

⁶ Mr. Stroz's CAPTCHA analysis , but his Yes/No analysis included them. *See* Dkt. 861, Mem. 13. Similarly, although his CAPTCHA analysis only considered



⁷ See Dkt. 861-6, Rubinfeld Reply Rep. ¶ 7; Dkt. 861, Mem. 10-11.

⁸ CDK's attempt to distinguish *Bone Care* (at 14) is unavailing – there, as here, the party tried to salvage a defective analysis by asking a second expert to vouch for the conclusions. The *Bone Care* court struck the initial testimony even applying a relaxed *Daubert* standard for bench trials.



C. Mr. Stroz's CAPTCHA Calculations Are Not Reliable

Mr. Stroz purports to identify See Dkt. 861-1, Stroz Rep. ¶¶ C20-21. But Mr. Stroz admitted he lacks expertise in or in computer coding generally. See Dkt. 861-3, Stroz Dep. 46:8-20, 190:14-19; Dkt. 995, Opp. 5 n.4. Mr. Stroz thus has no basis to See Dkt. 861, Mem. 20-21; NorthMobileTechLLC v. Simon Prop. Grp., Inc., 2012 WL 12996205, at *4 (W.D. Wis. July 9, 2012) (interpretation of computer code "is a high-level skill"). CDK tries to water down Mr. Stroz's opinions (at 5) by claiming he merely purported to But Mr. Stroz did not know how . See Dkt. 861-1, Stroz Rep. ¶ C19; Dkt. 861-3, Stroz Dep. 34:24-37:2. Thus, Mr. Stroz's analysis can hardly be recast as an attempt at Moreover, even if it could, ¹¹ so Mr. Stroz is no more qualified to "check" himself. 12 III. Mr. Stroz's Opinions With Respect To The Dealers Are Unhelpful And Unreliable Mr. Stroz's analysis of alleged DMCA violations by the dealers will be unhelpful to a jury because he does not attribute violations to specific dealerships; instead, he lumps dealership groups ¹¹ See Ex. C, CDK-2888647 at 654 12

See Dkt. 861, Mem. 20-21. He never tested that assumption. See Dkt. 861-3, Stroz Dep. 119:5-9. CDK cannot get around this methodological flaw by relying (at 17) on documents Mr. Stroz never considered. See In re Testosterone Replacement Therapy Prods. Liab. Litig., 2017 WL 4772759, at *7 (N.D. Ill. Oct. 23, 2017).

together. This is impermissible because liability must be assessed individually. *See* Dkt. 861, Mem. 19, 23. CDK asserts (at 24) that "even if the jury needed to assign violations to individual dealerships, Stroz's opinion would still assist in doing so because it defines the *total* violations to be allocated." But CDK never explains how the jury is supposed to determine the number of violations by an individual dealership (what the jury must answer) from the total number of violations for a dealership group

CDK only claims (at 24) – without any support – that it can supplement Mr. Stroz's testimony with "further evidence tying violations to particular dealerships." Even if CDK could do so – which it has not demonstrated – this only confirms Mr. Stroz's testimony will be unhelpful to the jury because the jury would need to rely on *other* evidence to answer the pertinent questions Mr. Stroz did not analyze. 13

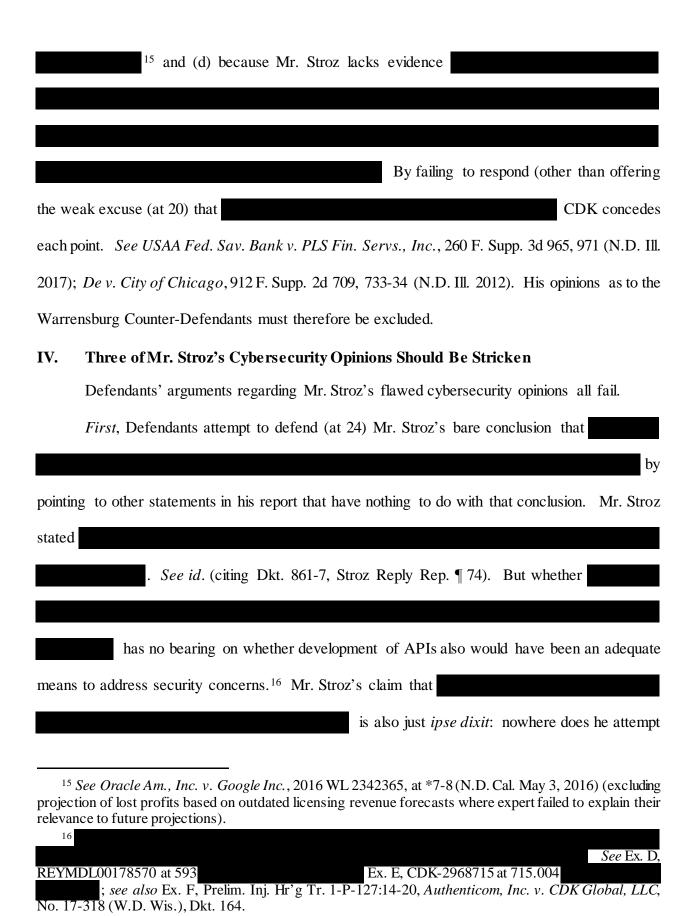
CDK also completely fails to respond to Plaintiffs' arguments (Mem. 17-18) regarding the unreliability of Mr. Stroz's testimony as to the Warrensburg Counter-Defendants – that is, (a) Mr. Stroz's opinion regarding

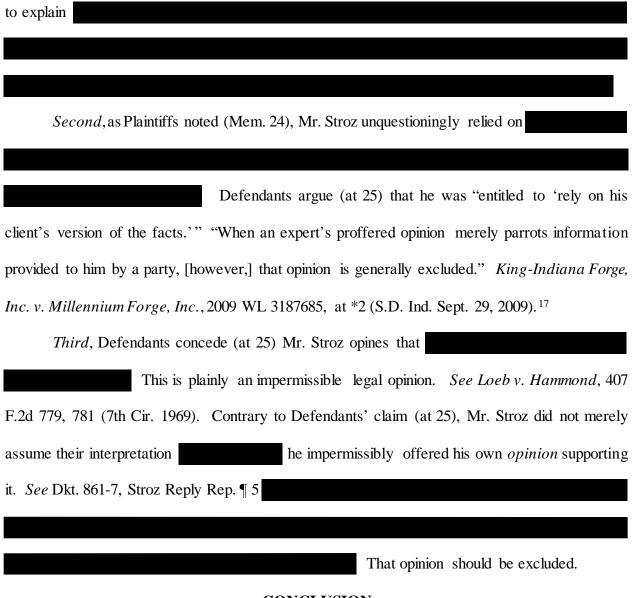
(b) Mr. Stroz had no reliable basis for

14 (c) the single piece of on which Mr. Stroz relies is unreliable, as it

¹³ Dealership Counter-Defendants' summary judgment reply brief will respond to CDK's arguments for the imposition of joint and several liability under the DMCA.

¹⁴ See Wasson v. Peabody Coal Co., 542 F.3d 1172, 1176 (7th Cir. 2008) (opinion based on only one month of data from one customer was unreliable).





CONCLUSION

Mr. Stroz's DMCA calculations should be excluded in full, and his cybersecurity opinions in part.

¹⁷ Harris v. City of Chicago, 2017 WL 2436316, at *12 (N.D. Ill. June 5, 2017), is distinguishable because the expert there performed a psychological assessment based on statements from the client. Here, Mr. Stroz merely parrots in his calculations without any attempt at verification.

Dated: July 8, 2020

Respectfully submitted,

/s/ Peggy J. Wedgworth

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CERTIFICATE OF SERVICE

I, Derek T. Ho, an attorney, hereby certify that on July 8, 2020 I caused a true and correct copy of the foregoing MDL PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE THE EXPERT TESTIMONY OF EDWARD M. STROZ to be filed and served electronically via the court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system. Copies of the Under Seal filing were served on counsel of record via email.

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